IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MARK ANTHONY TORRE, JR.,
Defendant-Appellant.

OPINION

Cite as: 2019 Guam 9

Supreme Court Case No.: CRA17-019
Superior Court Case No.: CF0421-15

Appeal from the Superior Court of Guam
Argued and submitted on November 1, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] Defendant-Appellant Mark Anthony Torre, Jr. appeals a final judgment finding him guilty of Negligent Homicide (As a Third Degree Felony) and Aggravated Assault (As a Third Degree Felony), both with the special allegation of possession or use of a deadly weapon in the commission of a felony. Torre seeks reversal of his convictions on multiple grounds, including on the basis that the trial court erred in denying his motion to suppress body camera footage and statements he made to police. For the reasons discussed below, we vacate the judgment of conviction and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] After a long day of drinking, Guam Police Department ("GPD") Officer Mark Torre, Jr. was seen leaving a bar in Tumon with GPD Officer Elbert "Bert" Piolo. At some point after arriving at Torre's residence, Piolo sustained a gunshot wound to the right side of his body. Piolo died that same morning.

[3] When GPD Officer John H. Edwards arrived at the scene and saw blood, he activated his body camera, which recorded visual and audio. As Edwards approached the residence, he encountered Torre holding Piolo up against a wall. According to witness testimony, Torre was inebriated, incoherent, dazed, and confused. Transcripts ("Tr.") at 120 (Cont'd Jury Trial – Day 6, Feb. 1, 2017) (testimony of Officer Edwards); Tr. at 18, 43 (Cont'd Jury Trial – Day 7, Feb. 2, 2017) (testimony of Officer Barry Flores). After medics took Piolo away, Torre's father escorted Torre to sit on the tailgate of a pickup truck in the driveway. Video Recordings ("VR") I at 4:15. Edwards questioned Torre, and Torre remained on the tailgate until medics arrived to examine him before taking him to the hospital approximately 35 minutes later. *See* VR I-IV.

[4] Torre moved the trial court to suppress this body camera footage from the moment that he was allegedly placed in custody, which Torre asserted in his motion was immediately after Piolo was placed in an ambulance for transport to a hospital. Following a suppression hearing, the court denied Torre's motion.

[5] During trial, the videotape evidence that was the subject of Torre's motion to suppress was admitted into evidence. A jury found Torre guilty of negligent homicide and aggravated assault, and the trial court entered a judgment of conviction on these verdicts. Torre timely filed a Notice of Appeal.

II. JURISDICTION

[6] This court has jurisdiction over an appeal from a final judgment of conviction. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-21 (2019)); 7 GCA §§ 3107(b), 3108(a) (2005); 8 GCA §§ 130.10, 130.15(a) (2005).

III. STANDARD OF REVIEW

[7] "We review factual findings made on a motion to suppress for clear error." *People v. Mateo*, 2017 Guam 22 ¶ 24; *see also People v. Farata*, 2007 Guam 8 ¶ 14. We review *de novo* whether those facts found by the trial court constitute a violation of a defendant's constitutional rights. *See Farata*, 2007 Guam 8 ¶¶ 13, 15, 42.

IV. ANALYSIS

[8] "The Fifth Amendment privilege against self-incrimination prohibits the prosecution from using statements stemming from custodial interrogation of the defendant, unless it demonstrates the use of procedural safeguards to secure that privilege." *People v. Rasauo*, 2011 Guam 1 ¶ 24. Accordingly, in order for the prosecution to admit statements made by a defendant during a custodial interrogation, the defendant must be advised of his or her constitutional rights prior to giving the statements sought to be admitted. *See Miranda v. Arizona*, 384 U.S. 436, 444

(1966). We apply the harmless error test to determine whether a violation of a defendant's *Miranda* rights requires reversal of the conviction. *See Rasauo*, 2011 Guam 1 ¶ 24. "An error of constitutional dimension is harmless if the state has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quoting *United States v. Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993)).

[9] The trial court found, and the parties do not contest, that Torre was interrogated. *See* Record on Appeal ("RA"), tab 98 at 7 (Dec. & Order, Mar. 30, 2016); Appellant's Br. at 14 (May 18, 2018); Appellee's Br. at 22-25 (July 9, 2018). At issue is whether Torre was in custody at the time of the interrogation. "*Miranda* . . . holds that an individual is in custody when he or she is 'taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Farata*, 2007 Guam 8 ¶ 23 (omission in original) (quoting *People v. Muritok*, 2003 Guam 21 ¶ 12). In determining whether a person has been taken into custody, we conduct two inquiries: (1) "what were the circumstances surrounding the interrogation"; and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *People v. Santos*, 2003 Guam 1 ¶ 51 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). Ultimately, whether a person is in custody depends on the totality of the circumstances. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). Upon our review of the record, we find that Torre was in custody at the time he made the incriminating statements admitted into evidence. The trial court therefore erred in denying Torre's motion to suppress.

A. The Surrounding Circumstances

[10] The inquiry into the circumstances surrounding an interrogation is "distinctly factual." *Farata*, 2007 Guam 8 ¶ 35 (quoting *Thompson*, 516 U.S. at 112). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views

harbored by either the interrogating officers or the person being questioned." *Id.* (alteration in original) (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam)).

[11] We accept the trial court's factual findings as none are clearly erroneous. *See Mateo*, 2017 Guam 22 ¶ 24. The trial court found that on the night in question, "numerous members of the Guam Police Department, which at a minimum included [four] patrol cars and nine police officers, responded to an assignment to go to [Torre]'s home to investigate a shooting." RA, tab 98 at 2 (Dec. & Order). "Upon arrival[,] the road leading to [Torre]'s home was blocked and a perimeter around the home was established to monitor and regulate access to the area." *Id.* "Officer Edwards' entire recorded interaction with [Torre] lasted 49 minutes. . . . During the interaction[,] [Torre] is never handcuffed, searched, patted down, advised of his *Miranda* rights or [formally] arrested." *Id.* at 3. "After Officer Piolo is taken by the medical personnel, a seat is provided for [Torre] on the tailgate of a pickup truck by his father." *Id.* "Frequently during the recorded interaction Officer Edwards places his hands on [Torre]'s shoulders and arms. It is clear from the interaction that the purpose of Officer Edwards' gestures are to comfort and support and are not to restrain or impede [Torre]'s conscious choices." *Id.* at 3-4. "Occasionally during the interaction[,] [Torre] also interacts with family members both in private and in the presence of the other Guam Police Officers." *Id.* at 4. "The interaction between [Torre] and the Guam Police ends with [Torre] being transported by ambulance to Guam Naval Hospital. Guam Police Officers did not accompany [Torre] to the hospital." *Id.* at 5. "The two officers that interacted primarily with [Torre] . . . where [sic] family friends and relatives of [Torre] and his family." *Id.* Upon our review of the record, we find none of these factual findings were clearly erroneous and this is an accurate and objective recitation of the relevant surrounding circumstances.

B. Whether a Reasonable Person Would Have Felt at Liberty to Terminate the Interrogation and Leave

[12] We next consider whether a reasonable person in Torre's position would have felt at liberty to terminate the interrogation and leave. This determination "presents a 'mixed question of law and fact' qualifying for independent review." *Farata*, 2007 Guam 8 ¶ 42 (quoting *Thompson*, 516 U.S. at 112-13). The custody analysis is an objective one and "involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning." *J.D.B. v. North Carolina*, 564 U.S. 261, 271 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004)); *Yarborough*, 541 U.S. at 668-69 (finding that defendant's prior run-ins with law enforcement is irrelevant to custody analysis because it relies upon defendant's subjective views). This objective test applies even where a law enforcement officer is the defendant. *See Owen v. State*, 490 N.E.2d 1130, 1134-35, 1137 (Ind. Ct. App. 1986) (conducting custody analysis without taking into account defendant's status as a police captain and expressly rejecting argument that because defendant was a police officer and knew his Miranda rights, the failure to comply with *Miranda* procedural safeguards was harmless); *see also United States v. Ambrose*, 668 F.3d 943, 956-60 (7th Cir. 2012) (conducting custody analysis and not taking into account defendant's status as a Deputy U.S. Marshal). A non-exhaustive list of factors relevant to the analysis of whether a reasonable person would have felt at liberty to terminate an interrogation "include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." *Howes v. Fields*, 565 U.S. 499, 509 (2012) (citations omitted).

[13] Two factors strongly support finding that a reasonable person in Torre's position would not have felt at liberty to terminate the interrogation and leave. First, the physical surroundings of the interrogation support finding that Torre was in custody. While it is generally true that

questioning that occurs in or around one's home "may militate against a determination of custody," this alone is not dispositive. *United States v. Brobst*, 558 F.3d 982, 995 (9th Cir. 2009). Even when questioned within the confines of one's home, a defendant may still be in custody for purposes of a *Miranda* analysis if "the degree to which law enforcement officers dominated the scene" was sufficiently great. *Id.* (collecting cases). Using this "police-dominated atmosphere" test, several circuit courts have found that in-home interrogations were "custodial" under *Miranda*. *See, e.g.*, *id.* at 995-96 (collecting cases) (ruling officers' presence inside and outside home supported finding defendant was in custody); *United States v. Craighead*, 539 F.3d 1073, 1084-89 (9th Cir. 2008) (ruling presence of eight armed officers in defendant's home supported finding defendant was in custody); *Sprosty v. Buchler*, 79 F.3d 635, 640-43 (7th Cir. 1996); *United States v. Griffin*, 922 F.2d 1343, 1351-52, 1354 (8th Cir. 1990). For example, in *Sprosty v. Buchler*, 79 F.3d 635 (7th Cir. 1996), a defendant was interrogated inside his mobile home. The court noted that the fact that the defendant was interrogated in the presence of his mother and at least one family friend and was not handcuffed or otherwise physically restrained weighed against finding he was in custody. *Sprosty*, 79 F.3d at 641-42. However, the court also noted that when the police arrived at the residence, "they surrounded [the defendant's] car, blocked the driveway from his car to the street, and escorted him inside." *Id.* at 642. Moreover, one officer guarded the defendant while four other officers searched the home. *Id.* In light of these facts, the court found that the defendant was in custody at the time of his interrogation. *Id.* at 643.

[14] Similar to the facts of *Sprosty*, Torre was not handcuffed or otherwise physically restrained and was interrogated in the presence of his father. These facts weigh against finding that Torre was in custody. However, at a minimum, four patrol cars and nine officers were present at Torre's home during the interrogation. RA, tab 98 at 2 (Dec. & Order). The road

leading to Torre's home was blocked and a perimeter around the home was established. *Id.* Torre was within that perimeter. *See* VR I-IV. There was at least one officer with Torre at all times. *See id.* When Officer Edwards stepped away from Torre to confer with Officer Flores, Edwards directed another officer to stay with Torre. VR I at 12:09. These facts support finding that Torre was in custody at the time of his interrogation. *See South Dakota v. Long*, 465 F.2d 65, 69-70 (8th Cir. 1972) (finding a defendant was in custody, in part, because he was continuously chaperoned).

[15] Second, the pressure applied to detain Torre supports finding he was in custody. The trial court determined that "the purpose of [Officer Edwards placing his hands on Torre's shoulders and arms during the interrogation was] to comfort and support and [was] not to restrain or impede [Torre]'s conscious choices." RA, tab 98 at 3-4 (Dec. & Order). This finding of purpose relates to Edward's subjective intent. While it may have been Edwards's intention to comfort and support, an officer's "beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Santos*, 2003 Guam 1 ¶ 53 (quoting *Stansbury*, 511 U.S. at 325). Edwards kept one or two hands on Torre's shoulders for most of the interrogation. *See* VR I-II. In such a situation, a reasonable person would feel that his freedom of action was greatly curtailed.

[16] The People argue that Torre was not in custody because he went to the hospital without a police escort. *See* Appellee's Br. at 23-24. The People provide no authority for this contention, *see id.*, and while the fact that a defendant was released after interrogation is a factor to consider, it is not determinative. The Ninth Circuit has found defendants to be in custody under *Miranda* even when the defendant was released from custody after the interrogation. *See, e.g.*, *Craighead*, 539 F.3d at 1079 (defendant was not arrested at any time prior to his conviction and appeared in

court by summons only); *United States v. Kim*, 292 F.3d 969, 972, 978 (9th Cir. 2002) (police left after interrogation without arresting defendant); *United States v. Beraun-Panez*, 812 F.2d 578, 580-82, *as modified by* 830 F.2d 127 (9th Cir. 1987) (defendant returned to work after interrogation and was arrested three months later). This is merely a factor in the custody analysis.

[17] The factors supporting a finding that a reasonable person would not have felt at liberty to terminate the interrogation and leave outweigh those against such a finding. Accordingly, we find that Torre was in custody during the interrogation. However, Torre was not in custody until 12:09 of VR I, when Officer Edwards directed another officer to stay with Torre while Edwards conferred with Flores. Until this point, a reasonable person may have felt free to terminate the interrogation and leave. However, Edwards directing another officer to stay with Torre effectively placed Torre under guard and, consequently, a reasonable person would feel that his freedom of action was greatly curtailed once so chaperoned. *See, e.g.*, *Sprosty*, 79 F.3d at 642-43; *Long*, 465 F.2d at 69-70; *Griffin*, 922 F.2d at 1354. The interrogation ended at 07:58 of VR II when Torre began to speak privately with his father. Although Edwards later returns and appears to ask Torre another question, three medics are present and giving Torre medical attention when Edwards asks his question, *see* VR IV at 00:00 – 00:38, and in such a situation, a reasonable person would feel he was free to leave. *See Wilson v. Coon*, 808 F.2d 688, 690 (8th Cir. 1987) ("Detention for a medical examination is not a situation that a reasonable person would find inherently coercive in the sense required by *Miranda*.").

C. The Error Was Not Harmless

[18] Having determined that the trial court erred in denying Torre's motion to suppress, we must determine whether this constitutional error was harmless. *See Rasauo*, 2011 Guam 1 ¶ 24. "An error is harmless if we are able to conclude beyond a reasonable doubt that the defendant

was not prejudiced so as to affect the outcome of the case. The burden is on the government to establish that the error was harmless." *People v. Quenga*, 2015 Guam 39 ¶ 22 (citations omitted). The People have failed to argue the error was harmless. *See* Appellee's Br. at 22-25. Given it is the People's burden to establish that the error was harmless and given that Torre appears to have made inculpatory statements during the interrogation, the error was not harmless, and we reverse Torre's conviction.

[19] As we are reversing Torre's conviction on this basis, we need not consider the other issues on appeal. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33. However, without deciding the issue, we note our concern about the trial court's reliance on 9 GCA § 7.25 in permitting a prosecution expert to examine Torre when Torre did not plead guilty by reason of mental illness, disease, or defect.

V. CONCLUSION

[20] The trial court erred when it denied Torre's motion to suppress, and this error was not harmless. We **VACATE** the Judgment of Conviction and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice